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IN THE

# Supreme Court of the United States

October Term, 1963

No. 555

GENERAL INSTRUMENT CORPORATION,
*Petitioner,*

*v.*

NATIONAL LABOR RELATIONS BOARD,
*Respondent.*

On Petition for a Writ of Certiorari to the
United States Court of Appeals for the Fourth Circuit

## PETITIONER'S REPLY BRIEF

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## PETITIONER'S REPLY BRIEF

The Brief in Opposition of the National Labor Relations Board mis-states the facts to write out of this case the legal issues in the case which require review. It then tells the Court that this is an ordinary case of the Board's exercise of its discretion to choose between two possibly appropriate units and, therefore, that it merits no review.

The Court of Appeals, obviously troubled by the way in which the Board had found the unit of technicals alone, to be appropriate (*i.e.*, the Board said that *because* the union sought to represent only the technicals and had no

showing of interest among the professionals, the technicals, alone, constituted an appropriate unit), attributed to the Board findings which the Board did not make. (See Pet. 17.) Now the Board's brief goes even further in asserting non-existent findings in support of its decision.

The Board's brief says that, in its decision of March 27, 1962 (Pet. 32a-34a), "it found that the technical employees comprised a sufficiently homogeneous and distinct grouping of employees to constitute by themselves an appropriate unit. * * *" (Br. in Op. 4). Neither at the places cited in the Board's brief (J. A. 22, 28) nor at any other place in the Board's decision (Pet. 32a-34a) will this alleged finding be found. In fact, this Board statement is a paraphrase of a directly contrary finding which *was* made by the Regional Director, and adopted by the Board. (Pet. 33a.) The actual finding was that the evidence "establishes that the employees in the Employer's Thermo-Electric Division [*i.e.*, both the professionals and technicals] constitute a homogeneous, clearly identifiable group with distinctive work interests * * *"[1] (Pet. 42a).

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1. The Regional Director made this finding because of his five pages of detailed findings (Pet. 37a-42a) which establish the inseparability of professionals and technicals in their work, not, as the Board's brief would have the Court believe, *despite* two sentences of inaccurately stated findings (Br. in Op. 4). The evidence, summarized by the Regional Director, was that

> "The record revealed that all employees in the Thermo-Electric Division receive the same holidays, hospitalization and family death benefits. The hourly rated laboratory employees receive a $1000 life insurance policy, while those in the engineering classifications receive a life insurance policy based on their salaries which, in all cases, is higher than $1,000. All of the employees punch time clocks except the project engineers. The laboratory employees receive overtime as do junior engineers earning less than $90 per week. All these employees work in the same general area, and all work in close collaboration as a team in the performance of their duties under the general super-

The Board's brief mis-states the decision of the Court of Appeals just as it mistakenly reports the findings of the Board and the reasons which it gave for its decision. The brief says that "The court of appeals held that the Board did not exceed its authority under Section 9(b) of the Act in finding that the technical employees alone constituted an appropriate unit" (Br. in Op. 4). The Court of Appeals, however, justified the Board's decision in the following way: "The Board's decision, which rejects the Director's choice of the larger unit for policy reasons not considered by the Director, is amply supported by the findings of fact made and the reasons relied upon by the Director to support his alternative decision that a unit of the technicals alone would be an appropriate unit." (Pet. 20a.)

The Court of Appeals, in other words, recognized that the Board's decision was not made on the basis of an assessment of factors of appropriateness, but "for policy reasons." Those policy reasons, the impropriety of which is fully discussed in the petition, were that the representation petition had been filed by the union rather than by the employer and that the union had made no showing of interest in the professionals. (Pet. 9-13.) The Court of Appeals expressly said that if these policy reasons were the "sole basis for the Board's decision, a serious question

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vision of Barnat. The record shows that employees in the engineering classifications perform every operation in the division and that the laboratory employees at times perform work normally considered to be engineering work, such as heat transfer analysis, computer quoting, calculations of a complex nature, drafting and designing work and buying of parts and equipment. It also appears that frequently, where more than one employee is required for an operation, an engineer and a technician work together jointly rather than two technicians or two engineers. It is also a common occurrence to have senior engineers, senior technicians and laboratory technicians work side by side performing the same work." (Pet. 41a-42a.)

as to the validity of the Board's order would result." (Pet. 19a.) In saying, however, that the Board's decision was otherwise "amply supported by the findings of fact made and the reasons relied upon by the Director to support his alternative decision," the Court of Appeals, as the petition shows, erroneously relied on findings which the Board did not make and reasons which the Regional Director did not give for a non-existent alternative decision. (Pet. 16-17.)

In its point numbered "1," the Board's brief quotes from the opinion of the Court of Appeals that some of the factors found by the Regional Director and adopted by the Board "support a finding that sufficient distinctions between the technicals and the professionals exist to support a separation." (Br. in Op. 5.) This part of the opinion of the court below merely emphasizes that it tried to justify the Board's decision, which expressly was based only on what the Court of Appeals called "policy reasons," by suggesting a finding which the Board could have made—but the Board did not make that finding and the Court of Appeals does not say that it did. The Board's brief again, in the same vein, distorts the Board's decision by saying that the Board "selected one appropriate unit rather than another" when, in fact, what the Board did was to exclude the professionals from the unit found appropriate for "policy reasons," and thereupon find the truncated unit appropriate, not for any reasons which it assigned, but simply because the technicals were all that were left after the professionals were excluded.

Continuing its efforts to assign new and plausible reasons for its decision, to replace the insupportable one on which the Board actually based its decision, the Board's

brief, in its point numbered "2," says that "the fact, that the union in *Reynolds* did not object to representing the professional employees, whereas the Union here did, affords a substantial basis for distinguishing the two cases." (Br. in Op. 7-8.) The difficulty with that distinction is twofold: (1) the Board's decision did not make it; once again, there is an effort by the Board, in its brief, as there was throughout the opinion of the Court of Appeals, to mend hold, to assign a different ground for decision in place of the true and defective ground; and (2) it is, in any case, not true.

(1) The Board's brief notes that, in its decision, the Board distinguished *Reynolds* by saying that "the Employer-Petitioner sought a departmental unit which included both professional and technical employees, and no showing of interest was required": (Br. in Op. 7). With disingenuous accusation, the Board's brief goes on: "Singling out this last statement, petitioner concludes that the sole reason for the difference between this case and *Reynolds* is that here the representation petition was filed by the union while there it was filed by the employer." (Br. in Op. 7.) The fact is that the statement which is alleged to have been "singled out" is the *only* statement which the Board made about *Reynolds*. And it was not the petitioner who "concluded" that the basis of the Board's decision was that the filing party was the union rather than the employer; it was the Board which gave that reason.

Now, in its brief, the Board does not try to defend that reason. It says "*Reynolds* is distinguishable from the instant case for reasons entirely unrelated to the showing-of-interest requirement * * *" (Br. in Op. 7). The new

reasons which the Board assigns—surely because it recognizes that the old reason is indefensible—are that, in *Reynolds*, the union did not object to representing the professionals (Br. in Op. 6 n. 5, 7) and, in this case, the union did (Br. in Op. 7). Both premises are untrue. There is nothing in *Reynolds* to support the statement that the union there did not object to representing the professionals, and the Board's brief cites nothing. In an interesting exercise in self-generating authority, the Board's brief makes the unsupported statement of the *Reynolds*' union's lack of objection (Br. in Op. 6 n. 5) and then supports the reiterated statement by reference to its earlier footnote (Br. in Op. 7: "see supra, p. 6 n. 5").[2]

(2) Moreover, in this case, it simply is not true that the union objected to representing the professionals. On the contrary, the Regional Director was unaware of any such objection since, in his decision, he gave the union ten days in which to request withdrawal of the petition "If the Petitioner is unwilling to represent professional employees in the same unit with technical employees * * *" (Pet. 44a, n. 8). And in its "Brief in Support of Request for Review"[3] the union stated its willingness to represent the pro-

2. Had the union in *Reynolds* objected to representing the professionals, the four cases cited in footnote 6 of the Brief in Opposition would have required dismissal of the employer's petition. Those cases hold only that a union's unwillingness to represent some of the employees in an appropriate unit is reason, not (as the Board's brief would have it here) for finding the balance of those employees to be an appropriate unit, but for dismissing the employer's petition. In *Ny-Lint Tool & Manufacturing Co.*, 77 NLRB 642, the employer's petition was dismissed even though the union claimed a unit in a unit smaller than that sought by the employer.

3. Item 5 of Volume III on the Certified List of the National Labor Relations Board, part of the Transcript of Record certified by the court below.

fessionals, if the professionals voted for it.[4] Since, therefore, both premises of the new distinction of *Reynolds* put forward by the Board in its brief are invalid, neither its decision nor that of the Court of Appeals can be supported by it any more than by the original distinction which the Board attempted in its decision and which it chose not to defend in its brief.

In its point numbered "3," the Board's brief again uses hypothetical grounds to explain away its actual decision. Petitioner's objection that the Board allowed extent of organization to be controlling in its decision is based on what the Board *said* in its decision. (Pet. 17-19.) The Board, in its brief, now says, however, "Since * * * the unit of technical employees was otherwise appropriate on the basis of objective factors long accepted as legitimate, the Board would not violate Section 9(c)(5) by treating both the extent of organization and the Union's unwillingness to rep-

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4. The union urged:

"The fifteen technical employees Petitioner [the union] seeks to represent constitute one of several appropriate units, and the Board should direct an election in the manner following:

1. In the event a majority of the technical employees select Petitioner and a majority of the professional employees elect to join the overall unit, the technical employees shall be an appropriate unit;

2. In the event a majority of the technical employees select the Petitioner and a majority of the professional employees elect to join the overall unit but do not select the Petitioner, the technical employees shall nevertheless be an appropriate unit;

3. In the event a majority of the technical employees select the Petitioner and a majority of the professional employees elect to join the overall unit and also select the Petitioner, a unit of professionals and technicals shall be an appropriate unit;

4. In the event a majority of the technical employees do not select the Petitioner, the votes of the professionals will be of no consequence, since no showing of representation has been made and representation will be denied in all respects."

resent the professional employees as reasons for preferring this unit to that chosen by the Regional Director" (Br. in Op. 8-9). The question in this case is not whether the Board *would* have violated Section 9(c)(5) if it had made findings which the Board's brief now, contrary to the fact, says it made, and if it had then referred only incidentally to the lack of showing of interest. The question is whether the Board's decision does not conclusively show that it violated Section 9(c)(5) since the only, and, therefore, controlling, reason which it gave for its decision was the lack of showing of interest. Even the Board, in its brief, cannot make a separate ground out of the alleged unwillingness of the union to represent professionals,[5] but is compelled to fall back on the "lack of any showing of interest" as "some evidence of the union's unwillingness to represent * * * [professionals]." (Br. in Op. 8.)

The entire effort and purpose of the Board's brief is directed to erasing the fact that the Board, in the decision and order which the Court of Appeals enforced, relied solely on lack of showing of interest among the professionals as its reason for finding the technicals alone appropriate. Furthering this purpose, the Board's brief puts forward other, new, grounds for the Board's decision which are deficient in themselves, as we have shown, and which, in any event, cannot be used to support the decision now since they were not in fact the basis of the decision.

In its last and most flagrant mis-statement and avoidance of the issues in this case, the Board's brief uses a footnote as pretended answer to petitioner's Point 3. The brief says "* * * the Board's choice between appropriate units did not depend upon the fact that the union made a showing of interest only among the technical em-

5 See pp. 6-7, *supra*.

ployees. The company was therefore not prejudiced by its inability to contest the validity of that showing (see Pet. 20-21"). (Br. in Op. 8, n. 7.) Despite the repeated contrary assertions of the Brief in Opposition, it is undeniable that the Board used the lack of showing of interest as ground for its decision. Petitioner does not urge that it was prejudiced because it was not allowed to contest the validity of the showing. What petitioner urges, in its Point 3, is that it was entirely improper for the Board to use as *any* basis for its decision material which was not, and could not be, under the Board's rules, any part of the record in the case. Contrary to what the Brief in Opposition says, this contention *was* made in the court below.[6]

## Conclusion

The Board's brief is a sustained effort to mend holes—to avoid the impossible task of defending the Board's true decision and to join the Court of Appeals in postulating another decision which it says could have been made and which is easier to defend. The three reasons for granting the writ based on the Court of Appeals' erroneous efforts to save the Board's true decision remain unrebutted. We submit the Board's egregiously transparent attempt to make the case appear other than it is emphasizes the need for review. The petition for certiorari should be granted.

Respectfully submitted.

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November 26, 1963

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6. Petitioner's Brief in the Court of Appeals, p. 31: "This Court will not find the 'showing of interest' on which the Board relied in the record of the representation case which has been certified here—such administrative matters are not made part of the 'formal record.'"